No. 18-483

IN THE

Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1943, *amicus curiae* Association of American Physicians & Surgeons ("AAPS") is a non-profit membership corporation of physicians who practice in nearly every specialty and state. AAPS defends the practice of private, ethical medicine, and works to preserve the sanctity of the patient-physician

[1] *Amicus* AAPS files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

relationship. The Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The U.S. Court of Appeals for the Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS, as a physician's organization that has been active for 75 years, has a direct and vital interest in defending the integrity of the medical profession and the ethics of the Oath of Hippocrates. AAPS has long advocated for strict adherence to the U.S. Constitution, which is at issue in this case.

SUMMARY OF ARGUMENT

The Constitution does not forbid States from classifying abortive remains as human remains, as the Indiana statute does. Yet the Seventh Circuit disagreed with the Eighth Circuit and the Constitution itself in holding otherwise, in order to accommodate Planned Parenthood's ideological objection to legislation. Symbolic implications of the contested Indiana statute, House Enrolled Act ("HEA") 1337, are for philosophers to sort out, not for federal courts to enjoin. The Petition should be granted to rein in judicial interference with legislation consistent with the Constitution, as the Indiana statute plainly is. The same standard of review for regulating hospitals should apply to abortion clinics, without any favoritism for Planned Parenthood.

It is an overreach by abortion-rights supporters to insist on a right to dispose of abortive remains in an

inhumane way. Nothing in *Roe v. Wade* and its progeny justify interference by courts with State laws governing the disposal of the results of abortions. The Petition should be granted to correct this severe distortion of law by the Seventh Circuit, and end its conflict with the Eighth Circuit and the Constitution.

The second question presented, which concerns Indiana's ban on abortions motivated solely by discrimination, likewise warrants review here. As with the first question discussed above, the real objection is to the symbolism in the statute, and not to any burdens placed on actual abortions. It is unknown whether any abortions in Indiana are actually performed "solely" for discriminatory reasons, which would be eugenics. It is unknown what effect, if any, informing women of a ban on discrimination would have. The legal challenge is primarily against the spirit of the law, which is not for courts to enjoin in the absence of an actual "case" or "controversy" as to its application. U.S. CONST. Art. III, § 2. Without evidence of any interference with actual abortions, there is nothing for courts to adjudicate.

The Petition could spark debate within the Court on whether to limit review to only the first question, concerning disposal of abortive remains. But both questions presented are interrelated, and should not be separated: both concern objections to the symbolic significance of legislation rather than any constitutionally significant burdens imposed. The Court should grant the Petition on both questions to limit judicial overreach based on symbolism rather than cognizable injury.

Ideological disputes about abortion, unsupported by legal injury, are not properly within the domain of

the federal courts. Yet the objections to the Indiana statute are primarily political rather than legal. Lawsuits, like this one, which seek to perpetuate the symbolism of *Roe v. Wade* should be dismissed. The decision below should be reversed, and remanded with instructions to dismiss the lawsuit.

The Petition for Writ of Certiorari should be granted on both questions presented.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED ON THE FIRST QUESTION BASED ON THE CONFLICT WITH THIS COURT'S RULINGS CONCERNING RATIONAL-BASIS REVIEW, AND WITH THE EIGHTH CIRCUIT.

The Constitution plainly does not prevent the State of Indiana from requiring humane disposal of abortion remains. The People of Indiana, through the legislative process, can properly decide for themselves how the remains from abortion should be disposed. *See* HEA 1337, Ind. Code § 16-34-3-4(a). The Indiana provision is thereby fully constitutional, and the Petition should be granted to reverse the unprecedented ruling below to the contrary.

The decision below ran afoul of clear authority of this Court on the rational-basis standard of review:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, ***it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature***.

FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (emphasis added). Despite this, the Seventh Circuit impermissibly relied on its perception of an alleged legislative motivation.

This Court further emphasized, in this widely cited precedent by Justice Thomas, that:

> [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"

Beach Communications, 508 U.S. at 315 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973), quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937)).

On rational-basis review – which both the district court and the Seventh Circuit agreed should apply here – this Court "ha[s] stressed that this standard of review is typically quite deferential; legislative classifications are 'presumed to be valid.'" *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988) (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)). This Court explained that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Lyng*, 485 U.S. at 370 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), inner quotations omitted).

Hence the burden is on Respondents, who attack the legislative classification in HEA 1337, "to negative every conceivable basis which might support it." *Lehnhausen*, 410 U.S. at 364 (internal quotation

marks omitted). *See also Hodel* v. *Indiana*, 452 U.S. 314, 331-332 (1981).

One need not look far today to see examples that easily justify the Indiana provision for humane disposal of abortion remains. For example, it was widely reported recently that:

> Police raided Perry Funeral Home on Trumbull Ave. Friday afternoon and found 36 fetuses in boxes and an additional 27 fetuses in freezers there, Detroit police chief James Craig said. "I'm stunned," Craig said. "My team is stunned. ***God help those families***."

George Hunter, "Detroit police find 63 fetuses in boxes, freezers of funeral home," Oct. 19, 2018 (emphasis added).[2] *See also* David Daleiden, "Why Are Taxpayers Buying Parts of Aborted Babies?", *Washington Examiner*, Oct. 23, 2018 (describing termination by the Trump Administration of one such contract by HHS for "taxpayer-funded experimentation" that included the harvesting of "fresh aborted baby body parts").[3] As physicians, members of *Amicus* AAPS have an interest in maintaining the dignity of patients and the medical profession, and then-Governor Mike Pence took a constitutional step towards protecting that dignity by signing HEA 1337 into law.

Yet the decisions below flouted the controlling authority concerning rational-basis review of abortion

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[2] https://www.detroitnews.com/story/news/local/detroit-city/2018/10/19/detroit-police-widening-investigation-into-local-funeral-homes/1698282002/ (viewed Nov. 11, 2018).

[3] https://www.washingtonexaminer.com/opinion/op-eds/why-are-taxpayers-buying-parts-of-aborted-babies (viewed Nov. 11, 2018).

industry practices. As Judge Manion aptly observed in his dissent, the panel majority contravened well-established norms of the undemanding rational-basis standard of review, and the Seventh Circuit went beyond what *Casey* might arguably require:

> The court then goes further than *Casey* requires, ... invalidating Indiana's requirement that abortion clinics bury or cremate fetal remains. I cannot agree. This is but the latest example of the legal misdirection that occurs in abortion cases. See *Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting). Under traditional rational basis review, if state action doesn't infringe upon a fundamental right or affect a protected class, we will uphold it so long as it is rationally related to a legitimate state interest. The fetal remains provision easily satisfies that extremely deferential standard. That part of Indiana's law rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn.

Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., dissenting) (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality decision)).

Indeed, *Casey* does not even apply to the disposal of abortion remains, and there is nothing in the record demonstrating any burden that HEA 1337 imposes on abortion by requiring a humane disposal of the remains. Instead, the facial challenge to the statute is primarily an objection to its symbolic implications. By invalidating the statute, the courts below strayed too

far into the realm of an ideological dispute, which is not the proper basis for a ruling by a federal court.

As Justice Kennedy wrote in rejecting a facial challenge to the filtering provisions of the Child Internet Protection Act (CIPA):

> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that ***would be the subject for an as-applied challenge, not the facial challenge made in this case.***

United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring, emphasis added).

The Seventh Circuit decision also conflicts directly with an Eighth Circuit decision of nearly thirty years ago. "We find the [abortion remains disposal] statute facially valid as construed, and that it does not interfere with a woman's right to obtain an abortion. We therefore reverse the district court and direct entry of judgment for the State." *Planned Parenthood v. Minnesota*, 910 F.2d 479, 488 (8th Cir. 1990).

Indiana's classification of the remains of abortion as human may have symbolic significance, and philosophers could debate this issue. But disputes over symbolism or philosophy do not constitute a proper Article III case or controversy that would justify judicial invalidation of a statute. *Cf. Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (an "Article III renaissance is emerging" in order to ensure that "textualism will [not] be trivialized" in the context of

Chevron deference, citing a decision by now-Justice Gorsuch).

It was an error of national significance for the courts below to misapply the rational-basis standard against HEA 1337 with respect to the first question presented here. The Petition should be granted.

II. THE PETITION SHOULD BE GRANTED ON THE SECOND QUESTION REGARDING THE BAN ON DISCRIMINATION.

When constitutional rights collide, one must yield. The judicially created *Roe v. Wade* never authorized discrimination, and its supporters overreach by demanding to elevate it above the well-established authority of a State to prohibit discrimination. While *Roe v. Wade* has been mistakenly called "super-precedent", there is nothing of the sort. "Of course, there's no such thing as 'super-precedent' — any case may be overruled by five Supreme Court Justices." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 311-12 (7th Cir. 2018) (Manion, J., dissenting).

The Republican Party was founded in part to reject the notion that a judicially created property right in slavery could override other constitutional rights, such as freedom of speech. In the years running up to the Civil War, Congress even adopted a self-imposed gag rule against bills relating to slavery, but the young Republican Party boldly rejected suppression of free speech on the issue of slavery. *See* Michael Kent Curtis, "The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37," 89 Nw. U.L. Rev. 785, 859 (1995) ("By 1859, a broad

defense of free expression on the subject of slavery was a central part of the ideology of the Republican Party. In the eyes of many, free expression became a right of American citizens."). Just as rights to slavery did not override freedom of speech, abortion rights should not override laws against discrimination.

Yet under the view embraced by Respondents and the decisions below, abortion clinics could seek to abort African American babies, or engage in gender-based abortion as in China. HEA 1337 prohibits abortions motivated solely by discrimination, and this does not transgress *Roe v. Wade*, 410 U.S. 113 (1973), which did not create any constitutional right to discriminate.

Nothing in the record shows any burden imposed on abortion by the non-discrimination provisions in HEA 1337, Ind. Code §§ 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, or by its requirement to disclose the ban to patients. *Id.* § 16-34-2-1.1(a)(1)(K). Despite this lack of evidence, the courts below elevated a right to abortion above the right to be free of discrimination, and this error warrants review by this Court. Any collision of these two rights must be resolved in favor of the authority of a State to prohibit discrimination. It is beyond irony that abortion is justified in the Constitution based on the same Fourteenth Amendment that was enacted to eradicate discrimination. The demand by some for abortion should not overrun the more than 150-year effort to eradicate discrimination.

The second question presented, concerning the invalidation of the non-discrimination provisions of the Act, does not implicate *Casey* on the undeveloped record in this facial challenge to HEA 1337. It is unproven that any abortions are being performed in

Indiana based "solely" on racial discrimination, given that a mother shares the same race with her offspring. Courts should not be in the business of invalidating laws without some showing that the laws have an unconstitutional impact, and yet no such showing has been made here.

This facial invalidation of all the non-discrimination provisions of HEA 1337 does not comport with the severability provision in the Indiana Code:

> (a) If any provision of this Code as now or later amended or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.
>
> (b) Except in the case of a statute containing a nonseverability provision, each part and application of every statute is severable. If any provision or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless ...."

Ind. Code § 1-1-1-8 (omitting exemptions that do not apply here).

The non-discrimination provisions in HEA 1337 have multiple parts, addressing discrimination based on race, gender, or disability. These provisions are severable from each other as dictated by the foregoing severability requirement of the Indiana Code. Even if there were a constitutional infirmity in one of the anti-discrimination provisions of HEA 1337, that would not justify invalidation of the other anti-discrimination provisions.

Moreover, nothing in the record shows any conflict with *Casey*. It held that "a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Planned Parenthood v. Casey*, 505 U.S. at 886. *See also Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Congress has [properly] established incentives that make childbirth a more attractive alternative than abortion.").

The abortion industry already receives unique favoritism in the United States, and hardly needs an unlimited right to discriminate too. In contrast, in Israel abortion is allowed only if there is an application to and approval by a Pregnancy Termination Committee, and "as of 1993, legal access to abortion had been narrowed through stricter limitations on the discretion of" those committees to approve abortion. Noya Rimalt, "When Rights Don't Talk: Abortion Law and the Politics of Compromise," 28 Yale J.L. & Feminism 327, 355 (2017).

The real objection to HEA 1337 may be its symbolic significance in prohibiting abortion based solely on discrimination. But disagreement with such symbolism is not a case or controversy within the proper purview of the federal courts. Article III standing never existed below for the Respondents to challenge, without evidence, the symbolism in HEA 1337. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (courts should "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches") (quoting *Warth* v.

Seldin, 422 U.S. 490, 499-500 (1975)). Indiana's ban on discriminatory abortions, and its disclosure requirement for the ban, are "most appropriately addressed in the representative branches," and the decisions below erred in ruling otherwise.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, it should be fully granted on both questions presented.

Respectfully submitted,

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